IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

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| WILLIAM MCGURK, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 02-1337-SLR |
| | ) | |
| SWISHER HYGIENE FRANCHISE CORP., | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM ORDER**

At Wilmington this 30th day of January, 2003, having considered defendant's motion to transfer (D.I. 3) and the papers filed in connection therewith;

IT IS ORDERED that the motion to transfer to the District of North Carolina is granted for the reasons that follow:

1. **Background.** Defendant Swisher Hygiene Franchise Corp. ("Swisher") is a North Carolina corporation, with its principal place of business in Charlotte, North Carolina. (D.I. 3, Ex. C) Swisher offers and sells franchises for the restroom hygiene business. Plaintiff William McGurk ("McGurk") is a citizen of Delaware. McGurk instituted this action alleging breach of the franchise agreement with Swisher. (D.I. 1) Swisher has moved to transfer contending that the forum selection clause in their franchise agreement mandates that all litigation related thereto be filed in North Carolina. (D.I. 3) McGurk concedes that there is a forum selection clause, however, argues there are overwhelming reasons to maintain the action here.

2. **Standard of Review.** Generally, a motion to transfer is reviewed under 28 U.S.C. § 1404(a), which allows a district court to transfer any civil action to any other district where the action might have been brought for the convenience of parties and witnesses and in the interest of justice. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). Before engaging in a transfer analysis, however, an examination of the forum selection clause, in the contract signed by the parties, is necessary.

The United States Supreme Court, in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), announced a general rule that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." Id. at 10; Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988). A party can resist imposition of a forum selection clause if it could demonstrate that the contract resulted from "fraud, undue influence, or overweening bargaining power," id. at 12, or that "enforcement would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision." id. at 15. The Third Circuit Court of Appeals has interpreted Bremen to mean that

> a forum selection clause is presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes (1) that it is the result of fraud or over-

> reaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement would in particular circumstances of the case result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable.

Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 202 (3d Cir. 1983), overruled on other grounds by Lauro Lines v. Chasser, 490 U.S. 495 (1989). As far as unreasonableness, under Bremen it is

> incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.

Bremen, 407 U.S. at 18. "This standard is satisfied if a litigant can demonstrate that it 'would face blatant prejudice in the foreign forum' or 'if enforcement of the foreign forum selection would be severely impractical.'" Mobilificio San Giacomo S.P.A. v. Stoffi, 1998 WL 125534 at *8(D.Del. 1998).

It is undisputed that in April 1997 McGurk signed a contract to purchase a franchise from Swisher. (D.I. 3, Ex. A) Pursuant to ¶ 20.2 (b) of the contract, the parties agreed that any action brought by the franchisee (McGurk) against the franchisor (Swisher) must be instituted in "Charlotte, North Carolina, or in the judicial district in which the franchisor then has its principal place of business." For approximately four years, McGurk owned and operated the Swisher franchise in Delaware. (D.I. 4, Ex. E) In September 2001, however, the terms of the

relationship began to change and eventually deteriorated in April 2002, when Swisher terminated McGurk's franchise agreement. Consequently, McGurk filed this action for wrongful termination of their contract. (Compare D.I. 3, Ex. C with D.I. 4, Ex. E)

The uncontradicted record reflects that the forum selection clause was never altered from the original terms agreed upon by the parties in 1997. There is likewise nothing demonstrating that the terms of the forum selection clause should be invalidated by the court. Although McGurk indicates that he has had surgeries on his knees as well as amputation of part of his foot, and that he is immobile, this does not suggest an impairment that would prevent him from prosecuting this action in the Western District of North Carolina.

3. **Conclusion**. Having determined that the forum selection clause is valid and enforceable, the motion to transfer (D.I. 3) to the Western District of North Carolina is granted.

Sue L. Robinson
United States District Judge